

CANADA / JUDGMENT

Jiang v. Piccolo

2020 BCSC 1584

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Supreme Court of British Columbia

DECIDED

27 October 2020

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2020 BCSC 1584 Jiang v. Piccolo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jiang v. Piccolo,

2020 BCSC 1584

Date: 20201027

Docket: S226596

Registry: New Westminster

Between:

Lijie Jiang

Petitioner

And

John Celeste Piccolo, Executor of the Estate of Donald John Piccolo,

Daniel John Piccolo and Dianne Bailey, Executor of the Estate

of Jason Donald Piccolo

Respondents

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Petitioner:

I.D. MacKinnon

Counsel for the Respondent John Celeste Piccolo:

T.C. Evans

Counsel for the Respondents Daniel John Piccolo and Dianne Bailey:

E.B. Clavier

Place and Date of Hearing:

New Westminster, B.C.

October 9, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 27, 2020

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I. Introduction

- [1] The petitioner, Ms. Jiang, applies pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA or the Act], for leave to bring legal proceedings in her own name and on behalf of the estate of a deceased person, Donald John Piccolo ("Donald") against Daniel John Piccolo ("Daniel") and Dianne Bailey, executor of the estate of Jason Donald Piccolo ("Jason").

- [2] The respondent John Celeste Piccolo ("John") is the executor of Donald's estate. He is Donald's brother. Daniel is Donald's son. Jason was also Donald's son. Jason died August 6, 2018.
- [3] Ms. Jiang contends that she was Donald's spouse, and that they were married in Shanghai, People's Republic of China, on September 26, 2012. She commenced an action July 13, 2018 claiming that Donald's will did not make adequate provision for her as his spouse (the "variation action"). As such she claims to be a "specified person" within the meaning of s. 151 of WESA, and is therefore entitled to seek leave to bring legal proceedings, pursuant to s. 151(1), which is as follows:
- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- [4] Primarily, the petitioner alleges that:
- a) Daniel or business entities he controls misappropriated or converted brewery equipment or the proceeds of sale thereof which ought to have formed part of Donald's estate; and
- b) Donald transferred a condominium in Mexico to Jason on February 15, 2018, four days prior to his death on February 19, 2018, when he was in hospice care. Ms. Jiang contends that Donald did not have the mental capacity to transfer the property, or was subject to undue influence or duress, and therefore the condominium should form part of Donald's estate.
- [5] In addition, Ms. Jiang proposes to make certain other claims on behalf of the estate.

II. Background

- [6] Donald was diagnosed with cancer of the bowel in or around February 2017. He was admitted to Abbotsford Regional Hospital on or about September 10, 2017. He was discharged from the hospital and admitted to hospice care at the end of October 2017. He made the will October 26, 2017, while he was in the hospital.
- [7] The will provides that the residue of Donald's estate is to be divided equally between Daniel and Jason. The will did not provide for any benefit to Ms. Jiang.
- [8] During his lifetime, Donald was involved in the business of beer brewing and the purchase and sale of brewery equipment through a company of which he was the sole shareholder, Old Abbey Ales Ltd. ("Old Abbey"). Old Abbey operated a microbrewery in the Fraser Valley. The petitioner contends that Donald purchased brewery equipment in China, and imported most of it through Washington State, before selling the equipment in British Columbia.

- [9] The executor, John, agrees that Donald was involved in the business of beer brewing and sale, and also of selling beer brewing related equipment. He says the equipment sales were made in Canada and the United States.
- [10] John states that Donald conducted his business operations through various entities, including Old Abbey, but also through other sole proprietorships and companies, including:
1. Magnum Boat trailers a.k.a. Magnum Trailers;
 2. Brewstuff;
 3. Tuff Trailer a.k.a. Tuff Trailer Canada ("Tuff Proprietorship"); and
 4. Tuff Trailer Inc.
- [11] Tuff Trailer Inc. is a company registered in the state of Washington. It is owned and operated by Daniel. The registration for the British Columbia proprietorship "Tuff Trailer" indicates its proprietor is Daniel. This accords with Daniel's evidence on his examination for discovery.
- [12] According to John, on information and belief from Donald during his lifetime, Donald would travel to China from time to time in order to purchase brewing equipment. Ms. Jiang assisted him with the purchase of brewery equipment in China.
- [13] Donald was also the sole director of Langley Brewing Company Ltd. ("Langley brewing"). In June 2017, Daniel became the sole director of Langley brewing. The company was dissolved December 23, 2019.
- [14] On the date of Donald's death, Donald and Daniel each owned a half interest in a property, a residence located at 28109 Fraser Highway in Abbotsford, the former residence of Donald, and where Daniel now resides.
- [15] Daniel was examined for discovery in the wills variation action on May 22, 2019. He testified that he was in the business of manufacturing trailers, mainly boat trailers, through a US company, Tuff Trailer Inc., which has operations in Ferndale, Washington, and also through the British Columbia proprietorship, Tuff Proprietorship. He testified that in the last few years of his life, Donald's business consisted of operating the brewery in Abbotsford, and also sale of brewery equipment, both in British Columbia and in the United States. He testified that Donald stored equipment at the business premises of Tuff Trailer Inc. in Washington state, but other than storing equipment for his father's business, and allowing potential customers to come by and view it, he was not involved in the sale of brewery equipment.
- [16] However, the petitioner has produced substantial documentation apparently showing that Tuff Trailer Inc. and/or Tuff Proprietorship was or were involved in purchase and importation of substantial volumes of brewery equipment.

[17] The petitioner also contends that:

- a) large amounts of brewery equipment were sold through Kwik Auctions, of Burnaby BC, in the summer of 2018, several months after Donald's death. The affidavit filed in support of the petition attaches numerous photographs and other documentation in relation to brewery equipment listed for sale on the website of Kwik Auctions at the material time. She alleges that the equipment may have belonged to the estate; and
- b) large amounts of brewery equipment were observed at the co-owned Fraser Highway property, now Daniel's residence, in March through June 2018, and has produced numerous photographs apparently showing that. She contends that further photographs taken on January 29, 2020 continue to show substantial quantities of brewing equipment (e.g., stainless steel tanks) being stored at Daniel's Abbotsford residence.

[18] On June 8, 2018, the petitioner's lawyer wrote to the lawyer for the executor, raising concerns that brewing equipment belonging to a company owned and operated by John were being sold through Tuff Trailer. Previous correspondence had raised the same concern.

[19] In response, the solicitor for the executor sent an email, headed "without prejudice" dated June 12, 2018. The email advised that brewery equipment was imported from China by Daniel, through Tuff Trailer Inc., which sells the equipment in the U.S., and in Canada through Tuff Proprietorship. He stated that he was advised that all invoicing, import and export documentation to verify this is in the possession of Tuff Trailer Inc.

[20] In his response to the petition, John takes issue with the petitioner's reliance on this and other similar communications marked "without prejudice". It is contended that the evidence is inadmissible as a result of settlement privilege. This point was not argued at the hearing of the petition.

[21] Merely labelling correspondence "without prejudice" does not render the correspondence inadmissible on the basis of settlement privilege. There must be:

- a) a dispute or negotiation between two or more parties; and
- b) terms of settlement offered: *Coombs v. LeBlond Estate*, 2013 BCSC 518, at para. 23.

[22] The correspondence does not contain a settlement proposal, and it is not clear to me that the correspondence is part of a chain of communications sent for purposes of settlement. John has not established that the evidence is inadmissible on the grounds of settlement privilege.

[23] I observe that, as Daniel has not sworn an affidavit in response to the petition, to some extent, the petitioner is forced to rely upon the hearsay information provided through John's solicitor.

- [24] John contends that all of the deceased's brewery equipment was sold prior to his death. He asserts that Donald decided he would need to sell the brewery equipment and related inventory owned by Old Abbey as well as his personally owned brewing equipment in December 2017, in order to pay his medical bills, which included the cost of a private clinic called "Hope for Cancer Ltd." which operates a medical treatment facility in Cancun, Mexico. The deceased agreed to pay \$42,400 (USD) for this medical treatment. The treatment was provided in July and August 2017.
- [25] John contends that all of the estate's assets are accounted for and are in his control, and that the estate has no interest in the equipment, assets or purported sale proceeds referred to by the petitioner.
- [26] John states in his affidavit sworn July 10, 2020 as follows:
51. I have come to my conclusions regarding the equipment, assets and purported sale proceeds, referred to by the Petitioner in the above noted requests, based on the following:
- a. knowledge that the Deceased intended to sell all of his personally owned beer brewing and brewing related equipment prior to his death to pay for his medical expenses;
 - b. My knowledge of the resulting sale of OAA's [Old Abbey Ales'] assets and the Deceased's assets;
 - c. My conversations with the Deceased regarding the Deceased's business operations, OAA and beer brewing equipment prior to his death; and
 - d. My conversations with Dan regarding Dan's, Tuff Inc.'s or Tuff Proprietorship's interest in any beer brewing or beer brewing related equipment located on or at the Property where Dan stated that any equipment located on the Property after the Deceased's death was either Dan's own property, the property of Tuff Inc or the property of Tuff Proprietorship.
- [27] John states that the Mexican condominium was transferred to Jason by deed of gift on February 15, 2018. He states that he was present when the deed was signed and he observed no deficiencies in Donald's state of mind or ability or capacity to deal with the property, nor any sign of undue influence on the part of Jason, Daniel, or any other person. He states that John told him that he intended to transfer the property to Jason before he died in order to have the property pass outside of the estate.
- [28] The deed of gift for the Mexican property indicates that the fair market value was \$230,000 (USD).
- [29] The petitioner demanded that the executor produce all medical records for one year prior to Donald's date of death in order to assess Donald's capacity at the time he executed the deed of gift, but John has declined to provide the medical records requested.
- [30] The petitioner makes additional claims related to estate property. These are with respect to:

- (1) motor vehicles;
- (2) debts claimed by Daniel; and
- (3) other claims.

[31] With respect to the motor vehicles, the petitioner notes that the affidavit of assets and liabilities prepared by the executor sworn September 5, 2018 lists ten motor vehicles with a value of \$58,000. A subsequent summary of estate assets prepared by the executor dated October 28, 2019 suggests that the estimated proceeds of sale of the vehicles is only \$20,000. She also alleges that there were other motor vehicles that she was aware of, owned by Donald, which are not noted in the executor's documentation.

[32] Daniel claims against the estate for \$49,265.64 (CAD) and \$42,400 (USD), as repayment of expenses he incurred on behalf of Donald. The \$42,400 USD claim is for payment of the Hope for Cancer treatment at the clinic in Mexico. The Canadian expenses appear to relate to Old Abby Ales.

III. Statute

[33] Section 151 of WESA insofar as it is pertinent to this matter, is as follows:

151 (0.1) In this section, "specified person" means a beneficiary, an intestate successor or a person who may commence a proceeding claiming the benefit of Division 6 [Variation of Wills] of Part 4 [Wills].

- (1) Despite section 136 [effect of representation grant], a specified person may, with leave of the court, commence proceedings in the name of the specified person and on behalf of the estate of the deceased person
 - (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
 - (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.

[]

- (3) The court may grant leave under this section if
 - (a) the court determines the specified person seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,
 - (ii) has given notice of the application for leave to
 - (A) the personal representative,
 - (B) any other specified persons, and
 - (C) any additional person the court directs that notice is to be given, and

(iii) is acting in good faith, and

- (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a specified person for the proceeding to be brought or defended.
- (4) On application by a specified person or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

IV. Analysis

A. Preliminary Issue - Relief against Implied Undertaking of Confidentiality

- [34] The petitioner seeks leave to rely on evidence given on examination for discovery in the wills variation action by Daniel and by John, on May 22, 2019, for purposes of the hearing of this petition. The response to petition filed by John objects to the use of the transcripts and contends that certain other documents relied upon by the petitioner should also be excluded on the same ground. The response of Daniel and of Jason's estate adopts John's position.
- [35] Daniel's examination for discovery evidence is largely relied upon for his denial of involvement in Old Abbey Ales or involvement in the brewery or selling of the brewery equipment. The discovery evidence of John relied upon is minimal, and is not essential to the petitioner's application.
- [36] As noted, without an affidavit from Daniel in response to this petition, the petitioner has no other direct evidence from Daniel pertaining to the issues she raises.
- [37] The documents John objects to the admission of, said to be produced on discovery, include the deed of gift for the Mexico property, a summary of estate assets, and some items of correspondence. As far as I can tell, these documents were not produced via discovery.
- [38] In *Juman v. Doucette*, 2008 SCC 8, Mr. Justice Binnie, on behalf of the Court, stated as follows:

34 Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings (see Queen's Bench Rules, M.R. 553/88, r. 30.1 (Manitoba); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario); Rules of Civil Procedure, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

35 The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).

36 On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (S.C.J.), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

[39] This case clearly falls within the type of circumstance referred to in para. 35, above. The parties are the same. There is an overlap of issues. There is no prejudice to the respondents in allowing the evidence to be utilized here. The purpose of use here cannot be considered "extraneous." The objection appears to be simply technical in nature. The interests of justice favour relief against the implied undertaking. Leave is granted.

B. The Affidavit Evidence Relied Upon by the Petitioner

[40] The respondents object to the nature of the evidence the petitioner relied upon for this application.

[41] All of the petitioner's evidence is provided on information and belief, through the affidavit of a legal administrative assistant employed by counsel for the petitioner.

[42] Counsel for the petitioner advised me that this was done as a matter of expediency, due to language issues and the fact that the petitioner is residing in Shanghai, and cannot travel.

[43] Rule 22-2(13) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 allows for the admission of hearsay evidence in an affidavit if the source of the information and belief of the person swearing the affidavit is given, and if the affidavit is made in respect of an application does not seek a final order, or by leave of the court.

[44] This application is similar to an application for leave to commence a derivative action. An order granting leave to commence a derivative action is an interlocutory order, as it does not finally dispose of the rights of the parties: *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1995] B.C.J. No. 2960, 23 B.C.L.R. (3d) 251 (C.A.) Therefore, the affidavit relied upon is admissible.

- [45] While the affidavit is admissible, reliance on such evidence is obviously not ideal. In some circumstances such evidence could be given less weight, or perhaps even no weight at all. However in the circumstances of this case, the hearsay nature of the evidence relied upon by the petitioner does not significantly affect the weight I give to that evidence.
- [46] I observe that much of the affidavit evidence of John is also on information and belief, including extensive references to statements attributed to the deceased, Donald. John also refers to the evidence of Daniel regarding his involvement and that of Tuff Trailer Inc., or Tuff Proprietorships' interest in beer brewing and related equipment, where the lack of any affidavit from Daniel himself is unexplained.
- [47] The respondents also argue that parts of the petitioner's affidavit should be excluded from evidence because they are argumentative or contain opinions. The references the respondents make are minimal and not significant. Therefore I decline to strike the referenced comments.

C. Standing

- [48] The respondents argue that the petitioner's standing to bring this application is in question, because the issue of whether the petitioner is a "spouse" within the meaning of WESA, for the purpose of making the wills variation claim, is contested. A trial of the wills variation action, limited to this issue, is scheduled to take place commencing November 30, 2020.
- [49] The respondents argue that this petition should be adjourned, pending the outcome of that trial.
- [50] The November 30, 2020 trial date is the third trial date set in the wills variation action. The trial is scheduled for eight days. However, counsel for the petitioner advises that the trial is unlikely to proceed on the scheduled date, and will likely have to be adjourned once again. Due to Covid-19, the petitioner/plaintiff Ms. Jiang cannot travel to Canada from Shanghai, where she resides. Counsel for Daniel and the estate of Jason has objected to Ms. Jiang giving her evidence by video link.
- [51] I conclude that the date when a decision will be made in the wills variation action as to the issue of whether the petitioner is a spouse or not is unknown, and probably not imminent.
- [52] From the perspective of judicial economy, there is no advantage to adjourning the hearing of this application, as it is concluded. The contention that these proceedings should be adjourned was raised halfway through the hearing of the petition, which occupied a day.
- [53] An adjournment could save the intended defendants and the estate from expense in responding to the proposed action. However, if, contrary to expectations currently, the issue in the wills variation action is resolved against the petitioner anytime soon, then the expenses involved in responding to the proposed proceedings will be limited.

[54] Prima facie, the petitioner is a spouse within the meaning of WESA. Ms. Jiang states that they were married, and has produced a document that she says is a true copy of the marriage certificate. I am in no position to assess the merits of this issue.

[55] In all the circumstances, I decline to adjourn the hearing of this petition.

D. Reasonable Efforts

[56] The respondents argue that the petitioner has not made reasonable efforts to cause the personal representative to commence or defend the proceeding.

[57] I am satisfied that she has done so.

[58] In *Fry v. Fry*, 2018 BCSC 1018 [Fry], Mr. Justice Milman held that in order to comply with the reasonable efforts requirement, the applicant must: (1) inform the personal representative of the specific allegations being made; and (2) request that the personal representative take, or allow others to take, specific remedial action to address them; the kind of effort that will suffice for these purposes will vary with the context of each case: (paras. 57 and 58).

[59] By letter dated October 22, 2019, counsel for the petitioner summarized, in great detail, the petitioner's concerns regarding misappropriation of brewery equipment and/or proceeds of sale thereof, and concerns about the title to the Mexican property, in a fashion very similar to the evidence presented on the hearing of this application. Counsel for the petitioner demanded that the executor aggressively pursue Daniel, Tuff Trailer Inc. and Tuff Proprietorship in order to determine if they have improperly seized and sold brewery equipment or equipment proceeds that should have gone to the estate, and clarify title to the Mexican property. Failing a positive response to the demand, counsel advised that this petition would be brought.

[60] In response, the executor, through counsel, stated that he has investigated the matter of the assets and is satisfied that the equipment referred to does not form part of the estate assets, and is satisfied that the transfer of the Mexican property was valid, by letter dated October 28, 2019.

[61] However, beyond these sorts of generic assurances, John has provided very little evidence of detailed investigations of these matters. The solicitor for the petitioner responded October 29, 2019, indicating in what manner the response was deficient. A number of other demands for information concerning the issues raised followed.

[62] The petitioner's demand letter of October 22, 2019 referenced several prior items of correspondence, extending back to June 8, 2018. In fact, concerns about misappropriation of brewery assets were identified as far back as correspondence dated April 11, 2018.

- [63] The respondents argue that the petitioner has failed to set out a specific request to commence an action against specific parties on the basis of specific causes of action. During argument it was suggested that it would be appropriate for the petition to provide draft pleadings, and a litigation plan. In my view such steps are not required.
- [64] I am satisfied that the petitioner has made more than reasonable efforts to cause John to commence proceedings against Daniel and the estate of Jason in respect of the brewery assets, or proceeds thereof, and in respect of the Mexican condominium.
- [65] The nature of the petitioner's allegations was made abundantly clear to the executor. The nature of the applicable causes of action is readily apparent, and in my view does not have to be specifically stated in order to comply with this requirement, nor is the petitioner required to provide draft pleadings or a litigation plan. In the circumstances, it is apparent that the executor has been notified of the specific allegations, and has no interest in pursuing them through litigation. I am therefore satisfied that this requirement has been met.
- [66] If leave is granted, there is no reason for leave to be restricted to the two primary complaints that the petitioner has raised. The executor has rejected the other possible claims suggested by the petitioner. It would not be sensible to refuse leave for the ancillary claims if leave is granted to pursue the major claims.

E. Good Faith

- [67] The respondents argue that the petitioner has not established that she is acting in good faith, as required by s. 151(3)(a)(iii) of WESA. In particular, they point out that the petitioner has not sworn an affidavit stating that she is acting in good faith.
- [68] The respondents rely on the comments of Mr. Justice Pearlman in *Luft v. Ball*, 2013 BCSC 574 [Luft], at para. 46, in the context of a corporate derivative action application, which were applied by Milman J. in *Fry*, at para. 59, in the context of an application for leave under s.151 of WESA. The comments of Pearlman J. at para. 46 are as follows:
- [46] The applicant bears the onus of establishing that it is acting in good faith in bringing derivative proceedings. Good faith is not presumed; the applicant must adduce evidence to establish good faith: *Creative Realty Corp. v. 333 Terminal Holdings Ltd.*, 2011 BCSC 638 at para. 19. The test of good faith is whether the action is brought primarily for the purpose of pursuing the claim on the company's behalf. The factors to be considered include the applicant's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives: *Bennett v. Rudek*, 2008 BCSC 1278 at para. 46. As Adair J. observed in *Lost Lake Properties Ltd.* at para. 56, ultimately good faith is a question of fact to be determined on all of the evidence and the particular circumstances of the case.

- [69] The concept of "good faith" is informed by the other aspects of s. 151. Section 151(1) refers to commencing proceedings to "recover property or to enforce a right, duty or obligation owed to the deceased person", or to "obtain damages for breach of a right, duty or obligation owed to the deceased person". Section 151(3)(b) refers of the question of whether it appears to the court that the proceedings are necessary or expedient "for the protection of the estate or the interests of a specified person". Therefore, a person genuinely pursuing these objects for the benefit of the estate or out of her own self interest is acting in good faith, within the meaning of s. 151.
- [70] While it would have been reasonable and appropriate for the petitioner to specifically swear that she is in fact seeking to cause the estate to pursue the claims "in good faith", in the circumstances of this case, a bare assertion to that effect would add very little. Therefore, such an affidavit is not essential.
- [71] On the evidence, it is clear that the petitioner wishes to pursue the claims for the obvious purpose of increasing the value of the estate, in which she hopes to share. Having regard to the purposes of the statute, this is a good faith purpose. It appears to me that she has provided all evidence available to her concerning the merits of the proposed claims. There is no suggestion of any ulterior motive on her part. There is therefore nothing for her to dispel in relation to the question of good faith.
- [72] As noted above, ultimately good faith is a question of fact to be determined on all of the evidence and in the particular circumstances of the case. I am satisfied that the petitioner is acting in good faith.

F. Necessary or Expedient

- [73] In *Bunn v. Bunn Estate*, 2016 BCSC 2146 [Bunn], a decision relied upon by all parties on this application, Madam Justice Gray stated at paras. 50-52:
- [50] In my view, a proceeding may be "necessary" under s. 151 of WESA if the personal representative is unwilling or unable to proceed. It may be "expedient" if it is in the best interests of the estate.
- [51] In this case, the applicant is a beneficiary of the Estate and seeks the order under s. 151 of WESA on the basis that the claim, if successful, will increase the value of the Estate. In such a case, in my view, to satisfy the court that it should exercise its discretion to grant leave to commence litigation on behalf of the estate, the applicant must show not only that there is an arguable case, but also that the potential relief in the action is sufficient to justify the inconvenience to the estate of being involved in the action, and that proceeding is overall in the best interests of the estate. In my view, that must involve a consideration of the costs of proceeding, including the potential of a costs award against the estate if it fails. Further, in my view, in determining whether the proposed lawsuit appears to be in the best interests of the estate, the court can consider the strength of the proposed claim based on a limited weighing of the evidence.

- [52] I reject the argument made by the Proposed Defendants to the effect that the court should show deference to the views of the executor, and grant leave only if the executor is in a conflict of interest. The views of the executor and the basis of those views are simply a factor for consideration.
- [74] While the court's task is not to decide the merits of the case, or issues of credibility, some limited weighing of the evidence is necessary: Bunn, at para. 47.
- [75] On the evidence, the petitioner presents an arguable case. This is particularly so in relation to the brewery equipment. In response to this claim, the executor has provided little more than bald assurances. The main target of these claims is of course Daniel and his business enterprises, who have provided no responsive evidence at all. The sale of brewery equipment by Old Abbey Ales does not establish that all of the brewery equipment that arguably ought to have formed part of the estate was not misappropriated. Daniel has not denied the allegations, and his limited evidence on examination for discovery appears inconsistent with the evidence presented on this application.
- [76] In weighing the evidence presented, in a limited way, I note that John's sympathies are likely to favour his nephew Daniel, together with whoever the beneficiaries of Jason's estate may be, as compared with the interests of the petitioner, who appears to be essentially a stranger to him, and perhaps to the other members of his family. I note that the respondents all contest the petitioner's claim to be Donald's spouse. I am therefore inclined to view John's assurances about the claims the petitioner makes with some scepticism.
- [77] The transfer of the Mexican condominium was so close in time to Donald's death from cancer that prima facie real questions arise as to the validity of the transfer. The executor has refused to obtain or divulge medical records which might assist to dispel these concerns.
- [78] The respondents argue that the cost of the litigation would be disproportionate in view of the value of the estate. It is not a large estate. The executor indicates that the total estimated net value of the estate is approximately \$468,000, but the estate faces uncertain tax liabilities. The estate is also involved in litigation which could ultimately increase or decrease the value of the estate.
- [79] No estimate of the value of the allegedly misappropriated brewery equipment has been provided. Any realistic estimate is not feasible at this stage. However, the evidence presented clearly indicates that the equipment is generally quite valuable, and that the volume of equipment in question is substantial.
- [80] The Mexican condominium had a substantial value in 2018, according to the deed of trust, of \$230,000 USD.

- [81] It is difficult to assess the economics of the proposed litigation. The claims with respect to the brewery equipment may be either easy or difficult to prove or dispel, depending on the documents Daniel and his businesses may have and the form they take. The petitioner has no way to assess this and neither do I, in the absence of evidence from Daniel.
- [82] In looking at the various invoices and sale documents provided, it is clear that the total amount of the potential claim could be substantial.
- [83] The action is necessary, because John will not pursue the claims. It is expedient, in that there is a reasonable likelihood that the benefit to the estate could substantially exceed the expense of the litigation, and the inconvenience to the estate is justified. The proposed proceeding is overall in the best interests of the estate.
- [84] The respondents express concerns about the cost of the litigation, and the fact that if the litigation is unsuccessful, the estate could be required to pay costs.
- [85] Although the petition seeks an order that the petitioner be indemnified for her legal costs and disbursements arising from the intended proceeding, the petitioner seeks, in the alternative, that the petitioner be at liberty to claim indemnity from the estate in the proceeding itself. I decline to make an order indemnifying the petitioner for legal costs and disbursements. Therefore, she will be required to carry the expense of the proposed litigation in the first instance. I leave the question of whether she may be indemnified from the estate following the conclusion of the litigation to the Court hearing those proceedings.
- [86] In all of the circumstances, it appears to me that it is necessary or expedient for the protection of the estate or the interest of a specified person for the proceeding to be brought, as required under s. 151(3)(b).

V. Conclusions

- [87] The petitioner is granted leave to bring legal proceedings against Daniel and against the estate of Jason, pursuant to s. 151(1) of WESA.
- [88] Pursuant to s. 151(4), I direct that Ms. Jiang is authorized to control the conduct of the proceeding.
- [89] The petition also seeks an order as follows:

An Order that for the purpose of this legal proceeding, the Petitioner shall be authorized to make demands for documents, from any third party person, business, or institution if the documents demanded would have otherwise been available to the Executor of Donald John Piccolo's estate, and that any third party person, business, or institution in receipt of such a demand shall treat it as if it had the same legal effect as a demand from the Executor of Donald John Piccolo's estate.

[90] This claim was not strongly pressed at the hearing. In my view the petitioner, as plaintiff, can make demands or utilize document discovery and production powers including obtaining necessary court orders in the same manner as any other litigant, and therefore the requested order is unnecessary.

[91] The petitioner has been successful and is awarded costs of this proceeding, jointly against the respondents. Costs are awarded as party and party costs at Scale B, without prejudice to any claim the petitioner may make for costs of this proceeding in the intended action.

"Verhoeven J."

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Prepared on 27 October 2026 · Esheria